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No. 99-1774

IN THE
Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC. AND
DILLARD'S NEVADA, INC.,

Petitioners,

v.

DELORIS BECKWITH,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

REPLY BRIEF FOR PETITIONER

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Respondent's 30-page opposition barely discusses—and *never defends*—the Nevada Supreme Court's patently unconstitutional "financial annihilation" standard for determining the appropriateness of punitive damages awards, repeatedly misstates the record, and misunderstands this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Respondent, moreover, utterly fails to rebut—and large concedes—Dillard's showing that lower courts are seriously divided over the use of a corporate defendant's wealth to evade or trump *BMW*'s due process standards. This Court should grant review to resolve the conflict over this important and recurring issue of federal law.

A. The "Wealth" Question Is Important And Recurring And Warrants This Court's Review

1. Nowhere in her 30-page opposition does Respondent ever contend that Nevada's "financial annihilation" standard is consistent with this Court's case law. To the contrary, Respondent concedes that this Court requires that a court awarding or reviewing a punitive award "'must be guided by more than just the defendant's net worth.'" Opp. 26 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)); *id.* at 24 (consideration of wealth "has been historically approved by this Court, *provided it is not the sole basis for assessing or upholding an award*) (emphasis added). But Respondent fails to acknowledge that the Nevada Supreme Court, in the face of Dillard's due process claim under *BMW*, affirmed the punitive award in this case based on the State's "general rule" for assessing punitive awards, which relies *solely* upon the defendant's wealth:

> Heretofore, we have recognized the subjective nature of punitive damages and the absence of workable standards by which to evaluate the propriety of such an award. Accordingly, we have allowed that determination to rest with the discretion of the trier of fact *unless the evidence introduced at trial shows that the amount awarded by the jury would financially destroy or annihilate the defendant* in which event we would attempt an appropriate adjustment of the award.

Pet. App. 9a-10a (citations omitted) (emphasis added).

Nevada's deferential and severely limited standard of review is irreconcilable with this Court's precedent, and denies *any* meaningful review of punitive awards, except in the narrow (and in the case of large corporate defendants, essentially non-existent) circumstances where the punishment would financially annihilate the defendant. As this Court explained in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), however, appellate review of the amount of punitive damages awards "has been a safeguard against excessive verdicts for as long as punitive damages have been awarded," and a State's efforts to substantially limit that "well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause." *Id.* at 421, 430. *Honda*, moreover, noted that this Court's prior punitive damages cases—particularly *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), which emphasized the need for meaningful and objective judicial scrutiny of punitive damages awards—had "strongly emphasized the importance of the procedural component of the Due Process Clause." *Id.* at 420-21; *see also Haslip*, 499 U.S. at 18 ("unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"). Such procedural safeguards are required precisely because "[p]unitive damages pose an acute danger of arbitrary deprivation of property," especially for "large, interstate and multinational corporations." *Honda*, 512 U.S. at 431-35.

Moreover, by tying what limited appellate review is available for punitive awards solely to the defendant's nationwide wealth, the Nevada Supreme Court invites juries to punish defendants based on their lawful economic activity in other States. This Court has repeatedly warned that introduction of evidence of a defendant's wealth may be unfair and unduly prejudicial to large, nonresident corporate defendants, and may raise special due process problems. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) ("[an] emphasis on the wealth of the wrongdoer

increase[s] the risk that the award may [be] influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *Honda*, 512 U.S. at 432; ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences"). Nevertheless, the courts below endorsed a punitive award that not only was based on such highly prejudicial wealth evidence, *see* Pet. 6-8 (discussing repeated use of inflammatory evidence regarding "corporate jets" and Dillard's position on the Fortune 500 list), but that amounted to nothing other than a punitive tax based on Dillard's lawful activities in other States. Such extraterritorial punishment is plainly unconstitutional. *See BMW*, 517 U.S. at 571-72; *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, __ U.S. __, 120 S. Ct. 1022 (2000) (invalidating California statute that imposed an impermissible tax on income earned outside State's jurisdictional reach).

As Justice O'Connor explained in *TXO*, upholding punitive damages awards where, as here, jury instructions, argument by counsel, and standards of appellate review "invit[e] the jury to redistribute wealth . . . based solely on [a large, corporate defendant's] financial position," 509 U.S. at 489-90 (O'Connor, J., dissenting), "renders the meaningful appellate review contemplated by *Haslip* [and now *BMW*] illusory" and allows courts "to disregard the post-trial review required by due process at whim or will." *Id.* at 500. And, of course, the Nevada Supreme Court's "financial annihilation" standard does not even remotely comply with the constitutional analysis mandated by *BMW*. This Court's review is necessary to restore the due process guarantees that the State of Nevada now denies corporate defendants.[1]

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[1] Respondent's repeated attacks on Dillard's counsel for having recently written a petition for certiorari in another case that presented substantially similar issues as Dillard's petition is bizarre. The fact that an important federal issue

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2. Respondent does not, because she cannot, seriously dispute that the lower courts are in conflict over what role a defendant's wealth should play under *BMW*. *See* Pet. 15-20. Rather, Respondent herself concedes that "lower courts may differ in the emphasis they place on a defendant's financial condition," and the most that she can muster in response is the assertion that a "majority of state and federal" courts decide the issue in the way that Respondent deems correct. But, without so much as a single citation, Respondent writes off these clear conflicts as merely a quirk of federalism produced by "the unique history of each state's common law." Opp. 28. As Dillard has demonstrated, however, many courts do not confine their analysis of wealth to the state-law excessiveness inquiry, but rather invoke the defendant's wealth as part and parcel of the *federal constitutional* analysis as a means to trump the three *BMW* guideposts and to uphold punishments that otherwise would be deemed excessive under the Due Process Clause. Pet. 15-20.

The Nevada Supreme Court below, for example, entirely disregarded Dillard's *BMW* due process arguments, and instead upheld the excessive punitive award in this case for the sole reason that that the award "will not financially destroy or annihilate" Dillard. Pet. App. 10a. The Nevada Supreme Court's decision, like the others identified in Dillard's petition that allow a defendant's wealth to trump or evade *BMW*, contradicts numerous decisions from other courts that have squarely rejected wealth as part of the *BMW* due process inquiry. Pet. 16-20.

Nor can Respondent escape the *BMW* Court's rejection of the plaintiff's argument in that case that the defendant's significant wealth saved the $2 million punishment from a finding of excessiveness under the Due Process Clause. *See* Pet. 11-12. Although Respondent argues that state courts have

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recurs in many cases is a compelling reason to *grant* certiorari, not to deny it.

long considered the defendant's wealth in analyzing punitive damage awards under *state* law and that this Court has not held that state courts are constitutionally barred from doing so (Opp. 23-26), that begs the question whether the defendant's wealth is or should be part of the *federal* constitutional calculus, or whether a defendant's wealth can be used to justify an otherwise unconstitutional award. The *BMW* Court, by refusing to include wealth as a guidepost, and by declaring, "[t]he fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business," 517 U.S. at 585, rejected wealth as a due process factor. But many lower courts—like Respondent—have read wealth back into the due process equation, creating conflict and uncertainty and defeating the possibility that defendants will "receive fair notice . . . of the severity of the penalty that a State may impose." *Id.* at 574.

B. The "Wealth" Question Is Squarely Presented By This Case

Respondent's main argument against certiorari is that Dillard's claim that the punitive award violated *BMW* was "neither pressed nor passed upon" in the Nevada Supreme Court, and therefore that the issue of the use of a corporate defendant's wealth to trump or evade this Court's *BMW* due process analysis is not properly presented in this case. Opp. 15-17. But that assertion is simply false.

Both in the trial court and the Nevada Supreme Court, Dillard repeatedly pressed its claim that allowing the jury to base its punitive award on Dillard's lawful income and wealth in other States violated *BMW*'s due process principles, *as even Respondent concedes*. Respondent's opposition acknowledges, as it must, that Dillard argued below "that it was improper *for the jury* to consider a defendant's wealth when assessing punitive damages" (Opp. 27) (emphasis in original), and Respondent concedes that "the Nevada Supreme Court *squarely addressed*" this "'wealth' issue." Opp. 3 (emphasis added). Indeed, the Nevada Supreme

Court's resolution of this important federal claim was to hold that it, like all other challenges to a jury's punitive damages verdict, is irrelevant unless the award would financially destroy the defendant. *See* Pet. App. 9a-10a.

Thus, Respondent, perhaps unwittingly, concedes that the question whether a corporate defendant's nationwide wealth can justify an otherwise excessive punitive award, so long as the award does not financially annihilate the defendant—*the only question presented in Dillard's petition*—is properly presented in this case. *See United States v. Williams*, 504 U.S. 36, 41 (1992) ("pressed or passed upon" rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon"). Respondent nevertheless asserts that this Court should refrain from considering this important federal question because Dillard failed to argue below that the punitive award in this case was actually "excessive" under *BMW*. Respondent, however, is mistaken.

Respondent erroneously asserts that Dillard never argued to the Nevada Supreme Court that the punitive award was "excessive" and only asked that the award be "vacated" because of the improper consideration of Dillard's nationwide wealth under *BMW*. Opp. 12. In its opening brief to the Nevada Supreme Court, however, Dillard argued that in *BMW* "the United States Supreme Court found the punitive damages awarded to be excessive and improperly based upon the defendant's status as an entity doing business nationwide," and that the award in this case plainly violated *BMW*. Appellant's Opening Br. 22; *see also* Appellant's Reply Br. 16 (asserting punitive award "runs afoul of the constitutional parameters established in *BMW*").[2] *BMW*, of course, announces principles and guideposts that determine the maximum punitive award permissible under the Constitution, and

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[2] Twelve copes of all cited briefs to the Nevada Supreme Court have been lodged with the Office of the Clerk of the Court.

therefore a claim that a punitive award violates *BMW* is by definition a claim that the award is "excessive."

In addition, as Respondent herself acknowledged below, Dillard specifically contended that Respondent's repeated reliance on Dillard's nationwide wealth and assets violated *BMW*'s due process standards and "inflam[ed] the jury" into awarding an excessive punishment. Appellant's Opening Br. 22-23; *see also* Respondent's Answering Br. 37 ("Dillard's argues that the district court inflamed the jury by allowing it to consider Dillard's national financial status").

Contrary to Respondent's assertion, moreover, Dillard asked the court to *reduce*—and not just to vacate—the punitive award under *BMW*: "*BMW* limits recoverable punitive damages to considerations of the effects of nationwide businesses and their conduct within the state of Nevada only. The punitive damages awards must be vacated, *or at least substantially reduced*." Appellant's Opening Br. 23 (emphasis added). Similarly, in its reply brief to the Nevada Supreme Court, Dillard argued that its conduct "[was] not comparable to the conduct of th[e] defendants in [other] punitive damages cases"; that "[c]onsideration of Dillard's nationwide sales [was] improper for deterring any 'violation' of' Nevada's workers' compensation laws; that "[t]he rule of *BMW* against deterring out-of-state conduct which violates no public policy requires the Court to vacate Beckwith's Judgment for punitive damages based upon Dillard's national sales"; and that for all these reasons, the punitive award was "*plainly excessive*." Appellant's Reply Br. 14-16 (emphasis added).[3]

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[3] Respondent's quibbles regarding the precise wording of Dillard's due process challenge are insufficient to deny this Court jurisdiction over Dillard's claim. A claim as preserved so long the record shows that "either expressly or by clear intendment," it was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Dillard's

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Respondent's assertion that Dillard never presented an "excessiveness" argument below is further belied by the fact that the Nevada Supreme Court in fact conducted an excessiveness review of the punitive award—albeit a constitutionally deficient one. In direct response to Dillard's *BMW* argument, the Nevada Supreme Court stated its "general rule concerning the award of excessive punitive damages," namely that any award is permissible so long as it does not financially destroy the defendant. Pet. App. 9a-10a. Applying that "general rule" to this case, the court reasoned that "[t]he award will not financially destroy or annihilate Dillard. Therefore, the punitive damage award is affirmed." *Id.* Thus, the Nevada Supreme Court plainly understood Dillard's argument that the jury's consideration of Dillard's nationwide wealth in awarding punitive damages violated *BMW* as presenting an excessiveness claim, and passed upon that claim in a way that fully presents the import federal question presented in Dillard's petition.

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repeated arguments based on *BMW* easily satisfied that standard. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (general "due process" arguments addressed to "the Florida Constitution and its Federal counterpart" provided "sufficient base for this Court's consideration of the federal issue") (citation omitted); *Braniff Airways v Nebraska State Bd.*, 347 U.S. 590, 599 (1954) ("[A]ppellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented."). Moreover, Dillard is entitled to raise any and all arguments in support that of that due process claim in this Court. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

That the Nevada Supreme Court believed that Dillard's federal due process arguments were fully presented and passed upon is also made clear by its issuance of a stay of its mandate to allow Dillard's to give this Court an opportunity to review the important federal question presented in Dillard's petition. As Respondent correctly points out, in seeking the stay, counsel for Dillard in the Nevada Supreme Court presented the court with a copy of the petition for certiorari filed in another case that involved "exactly the same grounds as Dillard's discusses in its Motion for Stay." Opp. 1, Resp. App. 7a. Respondent opposed the stay, arguing that Dillard's *BMW* argument had little chance of success. Response to Appellant's Motion For Stay 2 ("Dillard's fundamental misunderstanding of the *Gore* decision will certainly doom any petition the company files").[4] The Nevada Supreme Court nevertheless exercised its discretion to issue the stay, thereby indicating that it considered the issue fully preserved and capable of review. Stay Order (Mar. 10, 2000) 1a-2a. *Cf. Lanza v. New York*, 370 U.S. 139, 142 n.6 (1962) (state court remittitur order demonstrated federal question had previously been presented and passed upon).

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[4] Notably, Respondent never argued to the Nevada Supreme Court that the *BMW* due process argument was not properly preserved or passed upon. *Id.* In fact, Respondent never raised any procedural arguments against Dillard's due process claim below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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